WENG LEE GRANITE QUARRY SDN BHD
v. MAJLIS PERBANDARAN SEBERANG PERAI

FEDERAL COURT, PUTRAJAYA
AHMAD MAAROP PCA
AZAHAR MOHAMED CJ (MALAYA)
RAMLY ALI FCJ
ALIZATUL KHAIR OSMAN FCJ
NALLINI PATHMANATHAN FCJ
[CIVIL APPEAL NO: 02(f)-110-11-2018(P)]
15 OCTOBER 2019

LOCAL GOVERNMENT: *Local authority – Duties of local authority – Quarry activities involving mining operations and removal of rock materials beyond boundaries of lands – Issuance of stop work notice by local authority pursuant to s. 70A of Street, Drainage and Building Act 1974 ('1974 Act') – Title to lands issued under National Land Code (Penang and Malacca Titles) Act 1963 – Condition B in titles excluded all written laws prohibiting mining or removal of specified materials beyond boundaries of lands – Whether quarry and mining activities on lands fell within ambit of 'earthworks' in s. 70(1) of 1974 Act – Whether s. 70A of 1974 Act regulatory or prohibitory – Whether local authority's discretion in granting earthwork approval absolute*

The appellant was a granite quarry operator and the registered owner of pieces of land in the Seberang Perai municipal area ('the lands') on which it carried out quarry activities that involved mining operations and the removal of rock materials beyond the boundaries of the lands. The title to each of the lands was issued under the National Land Code (Penang and Malacca Titles) Act 1963 ('1963 Act'). All titles carry an express condition ('Condition B') that states, 'The land comprised in this title: (B) Shall not be affected by any provision of the National Land Code or any other written law prohibiting mining or the removal of specified materials beyond the boundaries of the land.' Since 1972, the appellant had been carrying out rock quarry activities on the lands. In 2001, the respondent issued a stop work notice to the appellant as the appellant was carrying out quarry operations on the lands without having first applied for and obtained earthworks plan approval from the respondent. At this point, there was no protest made against the respondent and the appellant readily submitted the earthworks plan, which was approved by the respondent on 15 July 2002. The approval was subjected to various terms and conditions. However, on 3 April 2013, the respondent again issued a stop work order notice which stated that (i) the appellant was in breach of the conditions imposed by virtue of the approved earthworks plan dated 15 July 2002; and (ii) unless a new written approval was first obtained, no earthwork may commence on the lands. In point of fact, the appellant had carried out quarry works exceeding the minimum earth-cutting levels allowed in the earthworks plan approval. The notice was

issued by the respondent pursuant to s. 70A of the Street, Drainage and Building Act 1974 ('the Act'). The appellant thus sought a declaration that the lands be exempted from s. 70A of the Act and the imposition of conditions under the Act on the lands was *ultra vires* the 1963 Act. The appellant anchored its case on the primary ground that the provisions of s. 70A of the Act did not apply to the lands by the reason that Condition B in the titles excluded all written laws prohibiting mining or the removal of specified materials beyond the boundaries of the lands. The High Court Judge declared that s. 70A did not apply to the lands by reason of the endorsement of Condition B in the title to the lands. In essence, the High Court held that the Act is the written law that prohibited mining and removal of rocks as envisaged by Condition B. However, the Court of Appeal set aside the decision and hence, the court granted the appellant leave to appeal on the question as to whether s. 70A of the Act which, *inter alia*, provides that no person shall commence or carry out or permit to be commenced or carried out any earthworks without having first submitted to the local authority plans and specifications in respect of the earthworks and obtained the approval of the local authority thereto, was prohibitory in character, and therefore, does not apply to quarry activities on a land which issue document of title is issued pursuant to the 1963 Act and carries a condition which states that the land in that title shall not be affected by any provision of the National Land Code ('NLC') or any written law prohibiting mining or the removal of specific materials beyond the boundaries of the land, having regard to the Privy Council decisions in *Hughes and Vale Proprietary Ltd v. State of New South Wales And Others* and *Government of Malaysia & Anor v. Selangor Pilot Association*, and the decision of this court in *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan*.

Held (dismissing appeal with costs)
Per Azahar Mohamed CJ (Malaya) delivering the judgment of the court:

(1) The term 'earthworks' is defined in s. 70A(18) of the Act to include any act of excavation, levelling, filling with any material, piling, the construction of foundations or felling of trees, on any land or any other act of dealing with or disturbing any land. The quarry and mining activities undertaken by the appellant on the lands involved excavation, levelling and dealing with the land. Hence, the quarry and mining activities carried out by the appellant on the lands would fall within the ambit of the term 'earthworks' in s. 70(1) of the Act. (paras 19 & 20)

(2) During the assimilation process of the land laws in the Straits Settlement (Penang and Malacca) with the other Malay States, special provisions were introduced to maintain the existing rights of landowners in the Straits Settlement. An example of these special rights was the existing proprietary rights over minerals and rock materials that were hitherto enjoyed by owners of lands in Penang and Malacca. Section 45(2)(b) of the 1963 Act provides that every replacement title shall contain the

appropriate condition provided for in the Third Schedule. Para 2 of the Third Schedule provides for Condition B which has the effect of maintaining the pre-existing proprietary rights over minerals and rock materials enjoyed by landowners in Penang and Malacca. Condition B, when endorsed on the title, will give the landowner propriety rights over the minerals and rocks material on his land and therefore, the appellant had proprietary rights or entitlement over minerals and rock material found in the land. (paras 27 & 61)

(3) There is fundamental distinction between a provision that is prohibitory in character (absolute prohibition to carry out quarry activities), and a provision which is regulatory in character (controlling, regulating and supervising quarry activities). There is no absolute power on the local authority to prohibit mining for no apparent reasons. The respondent's discretion in granting approval to the earthwork plan was not absolute or arbitrary but was confined and restricted to considering and ensuring that the plans and specifications of the earthworks conformed with the prescribed standards to ensure safety in accordance with specific guidelines, *ie*, the Earthworks (Municipal Council of Province Wellesley) By-Laws 1992. Therefore, the case did not support the broad proposition of law that s. 70A of the Act is prohibitory in nature as it barred the appellant from carrying on any quarry activity on the lands unless an approval had been given by the respondent. (paras 37 & 44)

(4) From a plain reading of s. 70A, there is no express provision prohibiting earthworks absolutely. The provision generally permits the activities at issue, subject to regulation. Under the scheme of the Act, as the authority responsible for granting earthworks plan approval, the respondent was responsible for controlling, supervising and regulating the manner in which earthworks were carried out and to ensure that the landowner, at all times, complied with the procedural conditions imposed. In exercising the discretionary powers, the respondent must exercise it reasonably and in accordance with the terms of the Act. The respondent may impose such conditions as it deemed fit and may order the immediate cessation of the whole or any part of the earthworks if the safety of life or property is affected or is likely to be affected by any earthworks. (paras 62-64)

(5) The Earthworks (Municipal Council Of Province Wellesley) By-Laws 1992 enacted under s. 70A(17) of the Act provides detailed requirements, specifications and procedures in relation to the earthworks approval process. The respondent, when considering and approving an earthworks plan, was bound and guided by the provisions of the subsidiary legislation. Hence, the respondent's discretion in granting earthwork approval was not absolute or arbitrary but was confined and restricted to considering and ensuring that the plans conform with the prescribed standards to ensure safety in accordance

with the guidelines. Such discretionary powers are not left without legal limitations. The respondent must use the powers judiciously and within the limits of the powers prescribed by the law. (para 66)

(6) The approval of earthwork plans was required to enable the respondent as the local authority to control, regulate and supervise operations, amongst others, supervisions of the hill slope cutting, hill gradients, cleanliness, public safety, the water, silt and sediment flow, and boundaries and the interests of adjoining landowners. Since earthworks directly threatens physical harm to persons or property, and may undoubtedly touch on numerous aspects of human life and is capable of giving rise to considerable environmental impacts, as the controlling authority, the respondent was empowered to grant or withhold granting earthworks plan approval or imposing certain legal limitations on the land. Unmistakably, the respondent had a public policy interest in controlling the earthworks. (para 67)

(7) Therefore, s. 70A is regulatory and not prohibitory, in that, it only regulates the procedure for carrying out earthworks and does not prohibit earthworks absolutely. The total effect of this section is regulating, not only the appellant, but also others who carry out any earthworks including quarry activities and imposes the procedure for carrying out earthworks including quarry activities. The requirement for earthworks approval under s. 70A does not amount to prohibition of quarrying since the purpose of s. 70A is to regulate the way quarrying is to be conducted so as not to endanger or harm the environment, and is essentially for public good. The restriction placed merely ensured that the proprietary rights of the appellant over the lands were exercised in a proper and responsible manner. (para 68)

(8) In the circumstances, s. 70A does not prohibit quarrying activities but merely regulates such activities and Condition B only gives the appellant the right to quarry but it did not mean that the appellant could carry out quarry activities in any manner as it liked. Condition B did not exempt the appellant, as landowner of the lands, from having to comply with the provisions of s. 70A of the Act. Hence, the question of law was answered as follows: s. 70A of the Act, which, *inter alia*, provides that no person shall commence or carry out or permit to be commenced or carried out any earthworks without having first submitted to the local authority plans and specifications in respect of the earthworks and obtained the approval of the local authority thereto, is not prohibitory in character, and therefore, does not apply to quarry activities on a land which issue document of title is issued pursuant to the 1963 Act and carries a condition which states that the land in that title shall not be affected by any provision of the NLC or any written law prohibiting mining or the removal of specific materials beyond the boundaries of the land. (paras 69 & 70)

***Bahasa Malaysia** Headnotes*

Perayu adalah pengendali kuari granit dan pemilik berdaftar beberapa tanah di kawasan perbandaran Seberang Perai ('tanah-tanah') yang mana perayu menjalankan aktiviti-aktiviti kuari melibatkan operasi perlombongan dan pengalihan bahan-bahan berbatu melampaui sempadan tanah-tanah tersebut. Hak milik setiap tanah dikeluarkan bawah Akta Kanun Tanah Negara (Hakmilik Pulau Pinang dan Melaka) 1963 ('Akta 1963'). Kesemua hak milik menyatakan syarat nyata ('Syarat B') bahawa, 'The land comprised in this title: (B) Shall not be affected by any provision of the National Land Code or any other written law prohibiting mining or the removal of specified materials beyond the boundaries of the land.' Semenjak 1972, perayu telah menjalankan aktiviti-aktiviti kuari batu atas tanah-tanah tersebut. Pada 2001, responden mengeluarkan notis pemberhentian kerja kepada perayu kerana perayu menjalankan kerja-kerja kuari atas tanah-tanah itu tanpa terlebih dahulu memohon dan memperoleh pelan kelulusan kerja-kerja tanah daripada responden. Pada ketika itu, tiada bantahan dibuat terhadap responden dan perayu segera mengemukakan pelan kerja-kerja tanah, yang diluluskan oleh responden pada 15 Julai 2002. Kelulusan itu tertakluk pada berbagai terma dan syarat. Walau bagaimanapun, pada 3 April 2013, responden sekali lagi mengeluarkan perintah pemberhentian kerja yang menyatakan bahawa (i) perayu melanggar syarat-syarat yang dikenakan melalui pelan kerja-kerja tanah yang diluluskan bertarikh 15 Julai 2002; dan (ii) kecuali kelulusan bertulis baharu diperolehi terlebih dahulu, tiada kerja-kerja tanah boleh dimulakan atas tanah-tanah tersebut. Fakta adalah, perayu telah menjalankan kerja-kerja kuari melebihi aras minimum pemotongan tanah yang dibenarkan dalam pelan kelulusan kerja-kerja tanah. Notis tersebut dikeluarkan oleh responden menurut s. 70A Akta Jalan, Parit dan Bangunan 1974 ('Akta'). Oleh itu, perayu memohon deklarasi bahawa tanah-tanah itu dikecualikan daripada s. 70A Akta dan pengenaan syarat-syarat bawah Akta atas tanah tersebut adalah *ultra vires* Akta 1963. Perayu mengasaskan kesnya atas alasan utama bahawa peruntukan s. 70A Akta tidak terpakai pada tanah-tanah tersebut atas alasan Syarat B dalam hak milik-hak milik tersebut mengecualikan kesemua undang-undang bertulis yang melarang perlombongan atau pengeluaran bahan-bahan yang dinyatakan melepasi sempadan tanah-tanah tersebut. Hakim Mahkamah Tinggi mengisytiharkan bahawa s. 70A tidak terpakai pada tanah-tanah atas alasan pengendorsan Syarat B pada hak milik tanah-tanah itu. Pada dasarnya, Mahkamah Tinggi memutuskan bahawa Akta adalah undang-undang bertulis yang melarang perlombongan dan pengeluaran batu-bata seperti yang dibayangkan dalam Syarat B. Walau bagaimanapun, Mahkamah Rayuan mengetepikan keputusan itu dan dengan itu, mahkamah memberi perayu kebenaran merayu atas soalan sama ada s. 70A Akta yang, antara lain, memperuntukkan bahawa tiada seorang pun yang boleh memulakan atau menjalankan atau membenarkan siapa-siapa memulakan atau menjalankan apa-apa kerja tanah tanpa terlebih dahulu mengemukakan kepada pihak

berkuasa tempatan, pelan dan spesifikasi berkaitan dengan kerja-kerja tanah tersebut dan memperoleh kelulusan pihak berkuasa tempatan tersebut, adalah bersifat perintah larangan, dan oleh itu tidak terpakai untuk aktiviti-aktiviti kuari atas tanah yang dokumen hak miliknya dikeluarkan menurut Akta 1963 dan mengandungi syarat yang menyatakan bahawa tanah dalam hak milik tersebut tidak boleh terjejas oleh apa-apa peruntukan Kanun Tanah Negara ('KTN') atau apa-apa undang-undang bertulis melarang perlombongan atau pengeluaran bahan-bahan spesifik melepasi sempadan tanah, berikutan keputusan-keputusan Privy Council dalam *Hughes and Vale Proprietary Ltd v. State of New South Wales And Others* dan *Government Of Malaysia & Anor v. Selangor Pilot Association*, dan keputusan mahkamah ini dalam *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan*.

Diputuskan (menolak rayuan dengan kos)
Oleh Azahar Mohamed HB (Malaya) menyampaikan penghakiman mahkamah:

(1) Terma 'earthworks' didefinisikan dalam s. 70A(18) sebagai termasuk apa-apa tindakan mengorek, meratakan, memenuhkan dengan apa-apa bahan, memantak, membina asas atau menebang pokok-pokok, atas mana-mana tanah atau apa-apa tindakan lain yang berkaitan dengan atau mengganggu mana-mana tanah. Aktiviti-aktiviti kuari dan perlombongan yang dijalankan perayu atas tanah-tanah tersebut melibatkan pengorekan, perataan dan berurusan berkaitan tanah. Oleh itu, aktiviti-aktiviti kuari dan perlombongan yang dijalankan perayu atas tanah-tanah tersebut terangkum dalam ruang lingkup terma 'kerja-kerja tanah' dalam s. 70(1) Akta.

(2) Semasa proses asimilasi undang-undang tanah di Negeri-negeri Selat (Pulau Pinang dan Melaka) dengan Negeri-negeri Tanah Melayu yang lain, peruntukan-peruntukan khas diperkenalkan untuk mengekalkan hak-hak sedia ada pemilik-pemilik tanah di Negeri-negeri Selat. Sebagai contoh, hak istimewa ini adalah hak proprietari sedia ada terhadap bahan-bahan galian dan batu-bata yang sehingga kini dinikmati oleh pemilik-pemilik tanah di Pulau Pinang dan Melaka. Seksyen 45(2)(b) Akta 1963 memperuntukkan bahawa setiap hak milik gantian perlu mengandungi syarat sewajarnya yang diperuntukkan dalam Jadual Ketiga. Perenggan 2 Jadual Ketiga memperuntukkan Syarat B yang mempunyai kesan mengekalkan hak-hak proprietari terhadap bahan-bahan galian dan batu-bata yang telah lama wujud dan dinikmati oleh pemilik-pemilik tanah di Pulau Pinang dan Melaka. Syarat B, apabila diendorskan pada hak milik, akan memberi pemilik tanah hak-hak proprietari terhadap bahan-bahan galian dan batu-bata atas tanahnya dan oleh itu, perayu mempunyai hak-hak proprietari atau hak terhadap bahan-bahan galian dan batu-bata yang ditemui di tanah itu.

(3) Terdapat perbezaan penting antara peruntukan bersifat larangan (larangan mutlak daripada menjalankan kerja-kerja kuari), dan peruntukan yang bersifat kawal selia (mengawal, mengawal selia, dan menyelia aktiviti-aktiviti kuari). Tiada kuasa mutlak pada pihak berkuasa tempatan untuk melarang perlombongan tanpa alasan jelas. Budi bicara responden memberi kelulusan untuk pelan kerja tanah bukan mutlak atau semberono tetapi terhad dan terbatas untuk mempertimbangkan dan memastikan pelan-pelan dan spesifikasi-spesifikasi kerja-kerja tanah mematuhi standard yang dinyatakan untuk memastikan keselamatan menurut panduan-panduan spesifik, iaitu, Undang-undang Kecil Kerja Tanah (Majlis Perbandaran Seberang Perai) 1992. Oleh itu, kes ini tidak menyokong saranan luas undang-undang bahawa s. 70A Akta bersifat larangan kerana membataskan perayu daripada menjalankan kerja-kerja kuari atas tanah-tanah tersebut kecuali jika kelulusan diberi oleh responden.

(4) Pembacaan biasa s. 70A menunjukkan tiada peruntukan jelas melarang kerja-kerja tanah secara mutlak. Peruntukan tersebut secara amnya membenarkan aktiviti-aktiviti dalam isu, tertakluk pada peraturan. Di bawah skema Akta tersebut, sebagai pihak berkuasa yang bertanggungjawab memberi kelulusan pelan kerja tanah, responden bertanggungjawab mengawal, menyelia dan mengawal selia cara kerja-kerja tanah dijalankan dan memastikan bahawa pemilik tanah, pada setiap masa, mematuhi syarat-syarat prosedur yang dikenakan. Apabila melaksanakan kuasa budi bicara, responden mesti melaksanakannya dengan munasabah dan menurut terma-terma Akta.

(5) Undang-undang Kecil Kerja Tanah (Majlis Perbandaran Seberang Perai) 1992 digubal bawah s. 70A(17) Akta memperuntukkan keperluan-keperluan terperinci, spesifikasi dan prosedur-prosedur berkaitan dengan proses kelulusan kerja-kerja tanah. Responden, apabila mempertimbangkan dan meluluskan pelan kerja tanah, terikat dan dipandu oleh peruntukan-peruntukan perundangan subsidiari tersebut. Oleh itu, budi bicara responden dalam memberi kelulusan kerja tanah bukan mutlak atau semberono tetapi terhad dan terbatas pada pertimbangan dan memastikan bahawa pelan tersebut mematuhi standard yang diperuntukkan untuk memastikan keselamatan menurut garis panduan tersebut. Kuasa-kuasa budi bicara sedemikian bukan tanpa batasan undang-undang. Responden perlu menggunakan kuasa-kuasa tersebut dengan bijak dan dalam rangkuman kuasa-kuasa yang diperuntukkan bawah undang-undang.

(6) Kelulusan pelan kerja tanah diperlukan untuk memastikan responden, sebagai pihak berkuasa tempatan, mengawal, mengawal selia dan menyelia operasi-operasi, antara lain, penyeliaan-penyeliaan berkaitan

pemotongan cerun bukit, kecerunan bukit, kebersihan, keselamatan awam, aliran air, lumpur dan mendapan, dan sempadan dan kepentingan pemilik-pemilik tanah bersebelahan. Oleh sebab kerja-kerja tanah menjejaskan secara langsung keselamatan fizikal manusia dan hartanah dan tidak diragui boleh menjejaskan berbagai aspek kehidupan manusia dan boleh memberi impak besar pada alam sekitar, sebagai pihak berkuasa yang mengawal selia, responden berkuasa sama ada untuk memberi atau menolak kelulusan pelan kerja tanah atau mengenakan had-had perundangan tertentu atas tanah tersebut. Tidak diragui, responden mempunyai kepentingan polisi awam dalam mengawal selia kerja tanah.

(7) Oleh itu, s. 70A bersifat mengawal selia dan bukan melarang, iaitu, seksyen itu mengawal prosedur dalam menjalankan kerja tanah dan tidak melarang kerja tanah sama sekali. Kesan keseluruhan seksyen ini adalah untuk mengawal selia, bukan hanya perayu, malahan pihak lain yang menjalankan kerja tanah termasuk aktiviti-aktiviti kuari dan mengenakan prosedur untuk menjalankan kerja tanah termasuk aktiviti-aktiviti kuari. Keperluan kelulusan kerja tanah bawah s. 70A tidak bermaksud larangan untuk kuari oleh sebab tujuan s. 70A adalah untuk mengawal selia cara perkuarian dijalankan agar tidak membahayakan atau menjejaskan alam sekitar, dan secara penting untuk kebaikan awam. Pengehadan yang dikenakan hanya memastikan bahawa hak-hak proprietari perayu atas tanah tersebut dilaksanakan secara wajar dan bertanggungjawab.

(8) Dalam keadaan tersebut, s. 70A tidak melarang aktiviti-aktiviti kuari tetapi hanya mengawal selia aktiviti-aktiviti tersebut dan Syarat B hanya memberi perayu hak untuk kuari tetapi itu tidak bermaksud perayu boleh menjalankan aktiviti-aktiviti kuari dalam yang disukainya. Syarat B tidak mengecualikan perayu, sebagai pemilik tanah tersebut, daripada mematuhi peruntukan s. 70A Akta. Oleh itu soalan undang-undang dijawab secara berikut: s. 70A Akta, yang, antara lain, memperuntukkan bahawa tiada seorang pun yang boleh memulakan atau menjalankan atau membenarkan untuk memulakan atau menjalankan apa-apa kerja tanah tanpa terlebih dahulu mengemukakan pada pihak berkuasa tempatan pelan-pelan dan spesifikasi-spesifikasi berkaitan dengan kerja tanah dan memperoleh kelulusan pihak berkuasa tempatan berkenaan, bukan bersifat larangan, dan oleh itu, tidak terpakai untuk aktiviti-aktiviti kuari atas tanah yang dokumen hak milik dikeluarkan menurut Akta 1963 dan mengandungi syarat yang menyatakan bahawa tanah dalam hak milik tersebut tidak boleh terjejas disebabkan apa-apa peruntukan KTN atau apa-apa undang-undang yang melarang perlombongan atau pengalihan apa-apa bahan melampaui sempadan tanah tersebut.

Case(s) referred to:

Attorney-General for Canada v. Hallet & Carey Ltd [1952] AC 427 ***(refd)***
Commonwealth of Australia v. Bank of New South Wales [1949] 2 All ER 755 ***(refd)***
Coramas Sdn Bhd v. Rakyat First Merchant Bankers Bhd & Anor [1994] 2 CLJ 143 SC ***(dist)***
Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin [1997] 2 CLJ 248 CA ***(refd)***
Edinburg Street Tramways v. Torbain [1877] 3 AC 58 ***(refd)***
Government of Malaysia & Anor v. Selangor Pilot Association [1977] 1 LNS 28 PC ***(dist)***
M Pentiah v. Muddala Veeramallappa 1961 AIR 1107 ***(dist)***
McCarter v. Brodie [1950] 80 CLR 432 ***(refd)***
Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal [2002] 4 CLJ 105 FC ***(dist)***
Swan Hill Corporation v. Bradbury [1937] 56 CLR 746 ***(dist)***
Weng Lee Granite Quarry Sdn Bhd lwn. Pentadbir Tanah Seberang Perai Tengah & Yang Lain [2014] 2 CLJ 383 HC ***(refd)***

Legislation referred to:

Banking and Financial Institution Act 1989, s. 45(1)
Courts of Judicature Act 1964, s. 78(1)
Federal Constitution, arts. 5, 8, 13
Immigration Act 1959/63, s. 59
National Land Code, ss. 40(b), 42, 45(2)(b), 70, 71, 72, 73, 74, 75
National Land Code (Penang and Malacca Titles) Act 1963, ss. 2, 36, 45(2)(b), 93(3)(b), Third Schedule para 2
Port Authorities Act 1963, s. 35A
Street, Drainage and Building Act 1974, ss. 70A(1), (3), (4), (5), (8), (9), (17), (18), 117

Commonwealth of Australia Constitution Act 1900 [UK], s. 92
State Transport (Co-ordination) Act 1931 [NSW], ss. 17(4), 18(5), 19(1)

Other source(s) referred to:

Kevin Gray, *Elements of Land La*w, pp 16, 26
LA Sheridan, *Malaya and Singapore - The Borneo Territories*, p 334
Teo Keang Sood, *Land Law in Malaysia*, p 870

For the appellant - Lim Choon Khim, Tan Swee Cheng & Chin Yan Leng; M/s SC Tan
For the respondent - Kanesh Sundrum & Nurul Jannah Zakariah; M/s Kanesh Sundrum & Co

[Editor's note: Appeal from Court of Appeal; Civil Appeal No: P-02(NCVC)(W)-278-02-2017 (affirmed); Appeal from High Court, Pulau Pinang; Civil Suit No: 21NCVC-11-03-2015 (overruled).]

Reported by S Barathi

JUDGMENT

Azahar Mohamed CJ (Malaya):

Introduction

[1] This is an appeal against the judgment of the Court of Appeal that reversed the judgment of the High Court.

[2] This appeal concerns the question of whether a provision in a statute is prohibitory or regulatory in character.

Background Facts

[3] The factual background leading to this appeal is quite simple and straightforward. We will only highlight very briefly the pertinent undisputed facts in so far as they are relevant to the issues that arise for decision in this appeal before us.

[4] Majlis Perbandaran Seberang Perai ("the respondent") is the Local Authority for the Seberang Perai municipal area.

[5] At all material times, Weng Lee Granite Quarry Sdn Bhd ("the appellant") was a granite quarry operator and the registered owner of pieces of land in the Seberang Perai municipal area ("the subject lands") on which lands it carried out quarry activities that involved mining operations and the removal of rock materials beyond the boundaries of the subject lands.

[6] Title to each of these subject lands was issued under the National Land Code (Penang and Malacca Titles) Act 1963 ("the 1963 Act"). All titles carry an express condition ("condition B") that states as follows:

> The land comprised in this title:
>
> (B) Shall not be affected by any provision of the National Land Code or any other written law prohibiting mining or the removal of specified materials beyond the boundaries of the land.

[7] Since 1972, the appellant had been carrying out rock quarry activities on the subject lands, which are located next to the Mengkuang Dam in the Seberang Perai municipal area.

[8] In 2001, the respondent issued a stop-work notice to the appellant as the appellant was carrying out quarry operations on the subject lands without having first applied for and obtained earthworks plan approval from the respondent. At this point, there was no protest made against the respondent and the appellant readily submitted the earthworks plan, which was approved by the respondent on 15 July 2002. The approval was subjected to various terms and conditions.

[9] However, on 3 April 2013, the respondent again issued a stop-work order notice that stated:

(i) the appellant was in breach of the conditions imposed by virtue of the approved earthworks plan dated 15 July 2002; and

(ii) Unless a new written approval was first obtained, no earthwork may commence on the subject lands.

[10] In point of fact, the appellant had carried out quarry works exceeding the minimum earth cutting levels allowed in the said earthworks plan approval. The notice was issued by the respondent pursuant to s. 70A of the Street, Drainage and Building Act 1974 ("the 1974 Act") which stipulated that no person shall commence or carry out or permit to be commenced or carried out any earthworks without having first submitted to the local authority plans and specifications in respect of the earthworks and obtained the approval of the local authority thereto.

At The High Court

[11] About almost two years after the stop-work order notice was issued, on 18 March 2015, the appellant commenced in the High Court the current action under appeal seeking for:

(i) a declaration that the subject lands be exempted from s. 70A of the 1974 Act and the imposition of conditions under the Act on the subject lands, *ultra vires* the 1963 Act; and

(ii) Damages against the respondent for having prevented the appellant from carrying out quarry activities on the subject lands.

[12] The appellant anchored its case on the primary ground that the provisions of s. 70A of the 1974 Act did not apply to the subject lands for the reason that condition B in the titles, which excludes all written laws prohibiting mining or the removal of specified materials beyond the boundaries of the subject lands.

[13] The learned High Court Judge appraised the issues before her as two. First, whether the subject lands which contained condition B exempted the appellant from s. 70A of the 1974 Act? The second question being whether the imposition of s. 70A together with conditions made was *ultra vires* the 1963 Act.

[14] At the end of a full trial, the learned High Court Judge found both the answers in favour of the appellant. The High Court allowed the appellant's claim and granted the relief sought for, including damages to be assessed. The High Court declared that s. 70A did not apply to the subject lands by reason of the endorsement of condition B in the title to these lands. In essence, the High Court held that the 1974 Act is the written law that prohibited mining and removal of rocks as envisaged by condition B.

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At The Court Of Appeal

[15] The respondent appealed to the Court of Appeal. The appeal was allowed. The Court of Appeal set aside the decision of the High Court. In its judgment, the Court of Appeal made numerous findings and conclusions of primary facts, which can be summarised as follows:

B

(i) "Earthworks" defined in s. 70A includes quarrying works;

(ii) The stop-work notice was issued as a result of the appellant's breaches of the conditions imposed on the approved earthworks plan;

C

(iii) In the case of *Government of Malaysia & Anor v. Selangor Pilot Association* [1977] 1 LNS 28; [1977] 1 MLJ 133, the Privy Council held that the restriction placed on the pilots from exercising their profession was not a prohibition but merely regulatory in nature. This was because the restriction placed on the activities of the individual license pilots did not deprive them of property. Applying that principle, the requirement of

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earthworks plan pursuant to s. 70A did not prohibit mining. The requirement of the plan was merely to regulate the way mining is to be conducted so as not to endanger the environment, and is essentially for public good;

E

(iv) The High Court Judge had taken an inappropriate approach to determine the pertinent issue that the 1974 Act is a law prohibiting mining. The stoppage of mining in the stop-work notice does not make the 1974 Act a law, which prohibits mining as envisaged by condition B. The prohibition resulting from the stop-work notice took place only upon breach of the 1974 Act but not otherwise. Certainly it was not the

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correct criteria for classifying the 1974 Act as a law prohibiting mining, by looking at the stop-work notice. The High Court should have instead, analysed the 1974 Act as a whole and then assessed in particular s. 70A, as to whether, it is a law which prohibits mining, or merely a law that regulates mining activity;

G

(v) The requirement for approval of the earthworks plan by the respondent cannot amount to prohibition of mining. Section 70A was legislated with the purpose of protecting the environment, especially relating to mining operations. The requirement for approval of an earthworks plan before any mining operation can commence, made pursuant to the 1974

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Act cannot be construed as prohibiting mining, but it is a mere requisite to operate mining and it is intended for safety and environmental reasons. The High Court erred in holding that the 1974 Act is a law, which prohibits mining as envisaged by condition B; and

I

(vi) Section 70A is a procedural compliance which the plaintiff had to observe before mining operation can be operated. The applicability of s. 70A necessarily meant that the defendant might impose conditions,

which the plaintiff would have to comply with. Hence it is clear that the 1974 Act and s. 70A in particular, is not a written law prohibiting mining as envisaged by condition B.

[16] The present appeal arises from the decision of the Court of Appeal in setting aside the decision of the High Court.

At The Federal Court

The Question Of Law On Appeal To The Federal Court

[17] On 29 October 2018, this court granted the appellant's leave to appeal on the following question:

> Whether section 70A of the Street, Drainage and Building Act 1974, which *inter alia* provides that no person shall commence or carry out or permit to be commenced or carried out any earthworks without having first submitted to the local authority plans and specifications in respect of the earthworks and obtained the approval of the local authority thereto, is prohibitory in character, and therefore, does not apply to quarry activities on a land which issue document of title is issued pursuant to the National Land Code (Penang and Malacca Titles) Act 1963 and carries a condition which states that the land in that title shall not be affected by any provision of the National Land Code or any written law prohibiting mining or the removal of specific materials beyond the boundaries of the land, having regard to the Privy Council decisions in *Hughes and Vale Proprietary Ltd v. State of New South Wales and others* [1954] 3 All ER 607 and *Government of Malaysia & Anor v. Selangor Pilot Association* [1977] 1 MLJ 133, and the decision of this Honourable Court in *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan* [2002] 3 MLJ 72.

[18] The rival contention of the parties brings into focus whether the provision of s. 70A(1) of the 1974 Act is prohibitory or regulatory in character. To put the matter in perspective, it is necessary to set out s. 70A(1), with the necessary emphasis, as follows:

> No person shall commence or carry out or permit to be commenced or carried out any **earthworks** without having first submitted to the local authority plans and specifications in respect of the earthworks and obtained the **approval** of the local authority thereto.

Earthworks

[19] The term 'earthworks' is defined in s. 70A(18) of the Act to include any act of excavation, levelling, filling with any material, piling, the construction of foundations, or felling of trees, on any land, or any other act of dealing with or disturbing any land.

[20] The uncontroverted evidence is to this effect: that the quarry and mining activities undertaken by the appellant on the subject lands involved excavation, leveling and dealing with the land. Hence the quarry and mining activities carried out by the appellant on the subject lands would fall within the ambit of the term 'earthworks' in s. 70A(1) of the Act.

History And Background Behind The Introduction Of Condition B

[21] As we shall see, it is important to understand why document of title of land issued under the 1963 Act contains the endorsement of condition B. It is to be noted that the 1963 Act is only applicable to Penang and Malacca as clearly stated in s. 2. It is a special statute for and in respect of land in Penang and Malacca. Conditions B are express conditions which are statutorily provided under ss. 45(2) and 93(3)(b) and the Third Schedule of the 1963 Act.

[22] Learned counsel for the respondent carefully traced the legal as well the historical background behind the reason for the introduction of condition B by the 1963 Act that can be summarised in the following paragraphs.

[23] Prior to the National Land Code (the NLC), the position in the Malay States was that the State owned all minerals and rock materials. For example, under s. 11 of The Land Enactment 1911 applicable to the Federated Malay States (Selangor, Perak, Negeri Sembilan and Pahang), it was provided that every title to land only entitled the owner to a surface right only in the land and in absence of an express condition to the contrary, a land title did not grant the right to remove any gravel or stone beyond the boundary of the land.

[24] The Malay States Land Law was thereafter consolidated under the Federated Malay States Land Code 1926, which also introduced the Torrens Registration System into the Malay States. In 1965, the Federated Malay States Land Code 1926 was repealed and replaced by the NLC. The NLC, among others, maintained the principle that land conveys surface rights only (see ss. 40(b) and 45(2)(b)). Hence, the owner of a land, whether held perpetually or held under a term of years, has no proprietary rights over minerals and rock materials found on his land. Thus, under the NLC a proprietor cannot quarry and remove minerals and rock materials from his land unless he obtains such rights from the State.

[25] However, the position in Penang was the opposite where following the English Land Law that was introduced by the English Charter of Justices 1826, ownership of land entitled the proprietor to proprietary rights over all mineral and rock materials on the said land (see *Elements of Land Law* by Kevin Gray pp. 16 and 26, *Land Law in Malaysia* by Teo Keang Sood p. 870 and *Malaya and Singapore - The Borneo Territories* by L.A Sheridan p. 334).

[26] In 1963, steps were taken to assimilate the land laws in the Straits Settlement (Penang and Malacca) with the other Malay States. In particular, a uniform system for registration of land dealings (ie, the Torrens system) was sought to be introduced across Malaysia. This led to the enacting of the 1963 Act which is a legislation to provide for the introduction of a system of registration of title to land in the States of Penang and Malacca, for the issue of replacement titles, for the assimilation of such system to the NLC, and for matters incidental thereto (see preamble of the Act). The 1963 Act

provided, amongst others, for replacement titles with similar rights and interests to be issued to all landowners in Penang to replace the existing land deeds (see s. 36).

[27] During the assimilation process with the other Malay States, special provisions had to be introduced to maintain the existing rights of landowners in the Straits Settlement. An example of these special rights was existing proprietary rights over minerals and rock materials that were hitherto enjoyed by owners of lands in Penang and Malacca. Hence, s. 45(2)(b) of the 1963 Act provides that every replacement title shall contain the appropriate condition provided for in the Third Schedule. Para 2 of the Third Schedule provides for condition B, which has the effect of maintaining of the pre-existing proprietary rights over minerals and rock materials enjoyed by landowners in Penang and Malacca. Thus, condition B when endorsed on the title, will give the landowner propriety rights over the minerals and rocks material on his land. However, the position in other States are the opposite in that s. 42 of the NLC authorises the State to grant such rights over minerals and rock materials through the issuance of what is called a permit 4C. In such a situation, the landowner will not have to obtain permit 4C from the State Authority to carry out quarry activities (see *Weng Lee Granite Quarry Sdn Bhd lwn. Pentadbir Tanah Seberang Perai Tengah & Yang Lain* [2014] 2 CLJ 383; [2014] 9 MLJ 85). The powers and procedure in relation to the issuance of permit 4C is provided for in s. 70 to s. 75 of the NLC.

Submissions By The Appellant

[28] It is against the above background, that learned counsel for the appellant had argued before us that the endorsement of condition B on the documents of title for the appellant's subject lands means that the appellant is free to carry out quarry activities on the lands without first having to obtain earthworks plan approval from the respondent.

[29] Learned counsel argued that s. 70A(1) of the 1974 Act prohibits any form of earthworks unless the approval of the local authority is first obtained. Section 117 of the 1974 Act provides that such approval is given upon the discretion of the local authority. The effect of the said s. 70A is to bar the appellant from carrying out any quarry activity on the subject lands unless an approval has been given by the local authority (citing among others *Hughes and Vale Proprietary Ltd v. State of New South Wales and Others* (*supra*), *Selangor Pilot Association* (*supra)*, *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan & Another Appeal* [2002] 4 CLJ 105, *M Pentiah v. Muddala Veeramallappa* [1961] AIR (SS) 1107, *Coramas Sdn Bhd v. Rakyat First Merchant Bankers Bhd & Anor* [1994] 2 CLJ 143, *Swan Hill Corporation v. Bradbury* [1937] 56 CLR 746). By reason of the foregoing, learned counsel submitted that s. 70A of the 1974 Act must be construed as prohibiting mining. However, by virtue of condition B on the titles concerned, the provisions of s. 70A shall not affect the subject lands.

[30] He further put forward an argument that the Court of Appeal fell into serious error when it relied upon the Privy Council decision in *Selangor Pilot Association* and concluded that s. 70A of the Act did not constitute "a written law which prohibits mining or removal of specified materials from a land" because the provisions therein are regulatory, and not prohibitory, in nature. It was argued that the case does not support the legal proposition that a statutory provision is merely regulatory in nature if its effect is to subject a certain activity to the requirement of an administrative approval or license. In *Selangor Pilot Association*, learned counsel argued, the Privy Council was not invited to decide whether the restriction on the exercise of a pilot was a prohibition. What the board considered was whether the restriction on the exercise of a pilot's rights given by the grant of a license amounted to a deprivation of property and in violation of art. 13 of the Federal Constitution. It was therefore submitted, that a proper reading of the case should have led the Court of Appeal to the conclusion that the said s. 70A was prohibitory in nature.

Submissions By The Respondent

[31] The main thrust of the contention of learned counsel for the respondent is that condition B only gives the landowner the right to quarry. It does not regulate the procedure for carrying out quarry activities. Condition B does not exempt the landowner from having to obtain earthworks plan approval from the local authority under s. 70A of the 1974 Act for the purposes of regulating and supervising quarry activities.

[32] Hence, the presence of condition B does not mean that the landowner can carry out quarry activities in any manner he likes. The landowner still has to comply with quarrying procedures.

[33] On the basis of s. 70A, the requirement for earthworks approval does not amount to prohibition of mining since the purpose of s. 70A is to regulate the way mining is to be conducted so as not to endanger the environment, and is essentially for public good. This is the essence of the contention of learned counsel for the respondent.

[34] Section 70A was introduced primarily to regulate the mining industry for the purposes of controlling environmental pollution. Through approval of earthwork plans, the respondent as the local authority regulates and supervises operations such as hill slope cutting; hill gradients; cleanliness; public safety; water, silt and sediment flow; and enforcement of boundaries and the interests of adjoining landowners.

[35] There is a difference between the word "prohibiting" which interferes with proprietary rights and "regulating", which does not interfere with proprietary rights but merely ensures that the proprietary rights are exercised in a proper and responsible manner. The right to carry out quarry activities is clearly different from the regulation and supervision of quarry activities.

[36] Learned counsel invited us to consider that the appellant's granite quarry activities involve the blasting and cutting of hill slopes which are adjoining to the Mengkuang Dam. Without approval of earthwork plans and supervision by the respondent, the appellant would be free to carry out these blasting, cutting and quarrying activities without any regulation and supervision. This would not only endanger lives and properties, but would also lead to uncontrolled soil erosion and environmental pollution.

Our Decision

[37] The issues raised and the arguments by both sides turned upon this fundamental question: whether s. 70A of the 1974 Act prohibits or regulates quarry activities carried out by the appellant on the subject lands? In the context of the present case, it is not disputed that any written law that prohibits quarry activities would have no effect on the subject lands because of condition B in the titles concerned. In this regard, there is in our judgment, a fundamental distinction between a provision that is prohibitory in character (absolute prohibition to carry out quarry activities), and a provision, which is regulatory in character (controlling, regulating and supervising quarry activities).

[38] Before turning to the rival contentions of the parties, we will first deal with the three cases mentioned in the question of law posed for our determination.

[39] First, the Privy Council decision in *Hughes and Vale Proprietary Ltd v. State of New South Wales and Others*. In this case, the New South Wales State Transport (Co-ordination) Act, 1931-1952 ("the Act"), provided for the licensing of motor vehicles engaged commercially in the transport of passengers and goods on the public highways of New South Wales, and prohibited all unlicensed transportation, and authorised the imposition of certain charges on transport operations. The charges were imposed for the purpose of protecting the railways in New South Wales from competition. The Act effectively prohibited the operation of transport unless authorised by license, which might be granted or withheld at the absolute discretion of a State Authority. Section 17(4) of the Act provided that the board shall have power to grant or refuse any application of any person for a license or in respect of any vehicle or of any area, route, road, or district. Section 18(5) of the Act provided that the board may, in any license issued, impose a condition that the licensee shall pay to them such sums as shall be ascertained as the board may determine. Section 19(1) of the Act provided that the board may grant exemption from the requirements to be licensed under this Act in respect of any public motor vehicle or class of public motor vehicles in such cases and under such conditions as they think fit. Section 92 of the Commonwealth of Australia Constitution Act 1900 provided that no duties or charges should be imposed on trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation. The issue arising was whether the prohibition of unlicensed vehicles by the Act

was invalid in light of s. 92 of the Commonwealth of Australia Constitution Act 1900. The Privy Council held that such a prohibition subject to an absolutely discretionary exemption was not merely regulatory of the trade because the individual was thereby not allowed in effect to carry on his trade at all unless authorised by license, which might be granted or withheld at the discretion of a State Authority.

[40] At the hearing before us, learned counsel for the appellant submitted that in *Hughes and Vale Proprietary Ltd*, the Privy Council accepted the proposition made in *Commonwealth of Australia v. Bank of New South Wales* [1949] 2 All ER 755 in that a statutory restriction is not merely regulatory in nature when a legislative or executive act operates to restrict such activity directly and immediately as distinct from creating some indirect or consequential impediment which may fairly be regarded as remote. According to learned counsel, the Privy Council held that simple prohibition of the trade of an individual or such a prohibition subject to a discretionary exemption was not merely regulatory in nature. Learned counsel emphasised the point that the Privy Council agreed with the analysis undertaken by the dissenting judgment of Fullagar J in the *McCarter v. Brodie* [1950] 80 CLR 432, where His Honour held as follows:

> If I cannot lawfully prohibit altogether, I cannot lawfully prohibit subject to an absolute discretion on my part to exempt from the prohibition. The reservation of the discretion to exempt by the grant of a license does not alter the true character of what I am doing. This was, indeed, as I have pointed out, one of the two things that were really decided in *James v. Commonwealth*, though it was naturally treated as more or less self-evident, and the contrary view does not seem to have been very seriously argued. Such cases as *Melbourne Corpn v. Barry*, and *Swan Hill Corpn v. Bradbury*, do not, of course, afford exact parallels to such cases as the present, because they turn primarily on the meaning of the word 'regulate' in a statute, but they are, in my opinion, precisely in point, since one thing that they make plain is that, if a legislative body cannot lawfully prohibit altogether, it cannot lawfully prohibit subject to an administrative discretion to exempt from the prohibition. It is quite true to say that regulation may involve partial prohibition, but it is quite untrue to say that total prohibition subject to discretionary exemption or 'licensing' is merely partial prohibition within the meaning of that proposition.

[41] Learned counsel then argued that applying the principles enunciated in *Hughes and Vale Proprietary Ltd*, s. 70A of the 1974 Act is prohibitory in nature as it bars the appellant from carrying on any quarry activity on the subject lands unless an approval has been given by the local authority.

[42] We have read and given our utmost consideration to the judgment in the case of *Hughes and Vale Proprietary Ltd*, to point out the difference between that case from our present case. In our opinion, that case was decided on the basis that the Act in question effectively prohibited the operation of transport unless authorised by license, which might be granted or withheld at the absolute discretion of a State Authority. The main reason why the Privy

Council declared it invalid was because the relevant provisions of the Transport Act did not contain any condition as to what someone must do to acquire a license. The conditional prohibition therefore became as good as an absolute prohibition. This can be seen from the judgment of Lord Morton:

> The carriage of goods by road, which forms a most important part of this very thing, is made the subject of heavy imposts and of a definite prohibition except in so far as a branch of the executive government of the State thinks fit to permit particular persons to carry goods by specified vehicles. No conditions are laid down by the fulfilment of which a man may become entitled to a license. It lies entirely within the discretion of the Director of Transport and Highways acting under the direction of the Minister. The refusal of an application for a license on grounds that are arbitrary or fanciful or that no man could regard as lying within the scope or policy of the legislation would not suffice, but the discretion otherwise is absolute and in no circumstances has anyone an enforceable title to a license. To me these rather simple considerations appear decisive. In face of them I have not been able to see how it can be said that this branch of inter-State trade is absolutely free.

[43] Next, the Privy Council itself observed as follows at p. 629:

> There are, however, some passages in the judgments of the Chief Justice and Fullagar J, in *McCarter v. Brodie* which might be interpreted as necessarily condemning as invalid any licensing system under which an inter-State trader who could comply with all the regulations validly prescribed by law might be refused a licence. Their Lordships can imagine circumstances in which it might be necessary, eg, on grounds of public safety, to limit the number of vehicles or the number of vehicles of certain types in certain localities or over certain routes, with the result that some applicants might be unable to obtain licences. Such a system might well be justified as regulatory.

[44] On the other hand, in our present case, if we read the section in its entirety and within the context of *Hughes and Vale Proprietary Ltd*, then it would appear that there is strictly speaking, no absolute prohibition in s. 70A of the 1974 Act. What the applicant has to do is specify his proposed works plan and if approved, can proceed to carry on such works. There is no absolute power on the local authority to prohibit mining for no apparent reasons. More than that, as we shall see later in the judgment, no such absolute discretion is given to the respondent in granting approval to earthwork plan. The respondent's discretion is not absolute or arbitrary but is confined and restricted to considering and ensuring that the plans and specifications of the earthworks conform with the prescribed standards to ensure safety in accordance with specific guidelines, that is to say, the Earthworks (Municipal Council Of Province Wellesley) By-Laws 1992. This is the crucial difference between our present case and the case of *Hughes and Vale Proprietary Ltd*. For that reason, the case does not support the broad proposition of law, as contended by learned counsel of the appellant, to the

effect that s. 70A of the 1974 Act is prohibitory in nature as it bars the appellant from carrying on any quarry activity on the subject lands unless an approval has been given by the respondent.

[45] At this juncture, it is opportune we refer to the case of *Swan Hill Corporation v. Bradbury* [1937] 56 CLR 746 that was cited by learned counsel for the appellant to support his argument that s. 70A of the 1974 Act is prohibitory in nature since the appellant is barred from carrying on any quarry activity on the subject lands unless an approval has been given by the respondent. This was an appeal to the High Court of Australia that concerned the question whether a certain by-law was prohibitory or regulatory. The by-law provided that no person shall erect or cause to be constructed any building unless with the approval of the Council. It was also provided that the Council of every municipality with the approval of the Governor-in-Council may make by-laws for the following purposes or any of them or for any purpose in connection therewith: (a) Regulating and restraining the erection and construction of buildings erections or hoardings or offences abutting on or within ten feet of any street or road. Latham CJ held that by withholding approval, the Council could completely control to the point of prevention, the erection of building unless they conform to the ideas of the Council. Latham CJ said:

> Is the by-law valid under the power to make by-laws restraining the erection of buildings? A distinction is drawn in the judgments of the Supreme Court in the present case between restraining a person from a course of action and restraining a particular activity. I find myself unable to appreciate the distinction. Where the restraint which is under consideration is a restraint to be imposed by a by-law the restraint can operate only upon the acts of human beings, and not upon physical objects. It is possible to restrain a river by building an embankment, but it is not possible to restrain anything by means of a by-law otherwise than by restraining persons from a course of action. The power which is relevant in this case is a power to make by-laws restraining the erection and construction of buildings, etc. A by-law can restrain such erection or construction only by operating by way of restraint upon the acts of persons in erecting or constructing buildings. It therefore appears to me that in the relevant connection there is no ground for the distinction suggested between restraining an activity and restraining a person from an activity.

[46] However, the above passage is qualified by the view of Rich J who said:

> In the present case the purpose or purposes described by s. 198(1a) appears to me to fall far short of prohibiting all building except that of which the Council may approve. We are not here dealing with some evil practice or conduct, some trade or vocation obnoxious to the comfort, convenience and amenities of a neighbourhood, some objectionable or noxious condition which may arise where human beings dwell, some pest or pestilence.

> We are dealing with one of the essential services of human life - the provision of habitations and other buildings for human use. Everyone knows that the incidents attending the planning and construction of buildings need control. But no one would suppose that it was intended by the Legislature to allow a municipality to suppress all building except that which in its uncontrolled discretion it should think fit to allow in individual cases. If, because of a growing policy of subjecting the ordinary activities of the individual to the administrative control of public bodies, it appeared wise to the Legislature to entrust municipalities with so large a power, it would not be done by the vague conjunction of the words "regulating and restraining". The power contained in s. 198(3f) would not cover so general a reservation as that of all buildings.

[47] The distinction between that case and the present one is plain. In *Swan Hill*, the restriction was against an essential service of human life ie, a place to dwell. In contrast, s. 70A of the 1974 Act provides for the approval of plans and specifications. As we have seen earlier, the approval by the respondent would be subject to the by-laws ie, the Earthworks (Municipal Council Of Province Wellesley) By-Laws 1992.

[48] Further, as gleaned from the various judgments in *Swan Hill*, the High Court of Australia was inclined to render the relevant by-law prohibitory because:

(i) The language used in that by-law was "regulate and restrain". The court was of the view that "restrain" ought to be taken to mean "to prohibit" and since this was wider than "to regulate", the net effect was a prohibition. It has to be noted that s. 70A here is worded differently;

(ii) Rich J himself noted that the purpose of the by-law in *Swan Hill* was not to regulate pests or pestilence. It forbade something integral to human dwelling. Contrasting this rationale with the present case, here Parliament intended to create a provision with the express purpose of regulating environmental harm. This is analogous with Rich J's view on controlling 'pests and pestilence'.

[49] The second case referred to in the question is the case of *Selangor Pilot Association*. It is necessary to appreciate what that case concerns. The respondents were pilots under the Port Authorities Act 1963 ('PAA'). The pilots had been carrying out the business of providing piloting services within a certain area of Port Klang under the Merchant Shipping Ordinance 1952 ('the Ordinance'). The PAA was amended in 1972 adding two new ss. 29A and 35A to the Ordinance. The effect of these new sections was to empower the port authority to declare an area as a pilotage area, in which event no person may act as a pilot in that area unless employed by the port authority. The Port Klang Authority declared Port Klang as a pilotage area. Some members of the association elected to work for the authority. But other members refused to work for the authority. They sued the Federal Government and the Port Klang Authority claiming that the amendments to

A the PAA were unconstitutional as it deprived them of their right to property (goodwill and livelihood) and that they were therefore entitled to compensation. The appellant argued among others that the respondent had not been deprived of any property and that a distinction should be drawn between on the one hand a mere negative prohibition of property (the pilots B could operate as pilots elsewhere) and on the other hand actual taking of property (which had not happened here).

[50] The High Court dismissed the respondent's claim. The respondent appealed and the Federal Court allowed the appeal. The Federal Court, among others, held that the respondent had been legislated out of business C and that while it is true that they were not deprived of the physical assets of their business, nevertheless they have suffered an abridgment of the incidents of their ownership, they have been deprived of the business of supplying pilotage service in Port Klang though only by a negative or restrictive provision interfering with the enjoyment of their property. It was further held D that as s. 35A omits to provide for adequate compensation it contravenes art. 13 of the Federal Constitution.

[51] The appellant appealed to the Privy Council. The Privy Council allowed the appeal with a 4-1 majority (Lord Salmon dissenting). The Privy Council held that the restrictions placed on the activities of some members E of the respondent as licensed pilots did not deprive them of property. The Privy Council was of the view that the deprivation of the respondents of their property was in accordance with the law. All they lost was the right to act as pilots unless employed by the Authority and the right to employ others on pilotage, neither right being property. It was also held although a person F may be deprived of property by a mere negative or restrictive provision, it does not follow that every provision that leads to deprivation also amounts to compulsory acquisition or use.

[52] From the foregoing discussion, it is clear that the main issue in *Selangor Pilot Association* was whether the restriction on the exercise of a pilot's rights G given by the grant of a license amounted to a deprivation of property and in violation of art. 13 of the Federal Constitution. It is not a case where the court had to decide whether a provision in a statute is prohibitory or regulatory in character. We do not think that case directly supports the legal proposition that a statutory provision is merely regulatory in character if its H effect is to subject a certain activity to the requirement of an administrative approval or license. We therefore agree with the submissions of learned counsel for the appellant only to this extent: the Court of Appeal in the present case erred when it said, "This issue had been deliberated by the Privy Council case of *Government of Malaysia & Anor v. Selangor Pilot Association* I [1977] 1 LNS 28; [1977] 1 MLJ 133 ... In its deliberation, the Privy Council as observed by Lord Viscount Dilhorne, stated that the first question for

consideration was whether the restriction on the exercise of a pilot was a prohibition. The Privy Council held that the restriction placed was not a prohibition but merely regulatory in nature. This was because the restriction placed on the activities of the individual license pilots did not deprive them of property".

[53] To the above observation, we will add that we do not agree with the submissions of learned counsel for the appellant that a proper reading of *Selangor Pilot Association* should have led the Court of Appeal to the conclusion that the said s. 70A is prohibitory in nature. This is untenable and not what the Privy Council decided. As we have stated earlier, it is not a case where the court had to decide whether a provision in a statute is prohibitory or regulatory in character. The Privy Council was not called upon to determine whether the amendment to the PAA was either regulatory or prohibitory as that had no difference to the question whether they were deprived of their property. Either way there was deprivation. The question was more of whether the said deprivation was in accordance with law. The above is reflected in the following words of Viscount Dilhorne (for the majority):

> Their Lordships agree that a person may be deprived of his property by a mere negative or restrictive provision but it does not follow that such a provision, which leads to deprivation, also leads to compulsory acquisition or use. If in the present case the Association was in consequence of the amending Act deprived of property, there was no breach of Article 13(1) for that deprivation was in accordance with a law which it was within the competence of the Legislature to pass.
>
> In relation to Article 13(2) the question to be answered is: Was any property of the Association compulsorily acquired or used by the Port Authority? Only if there was, could there have been a failure to comply with Article 13(2). The only property, launches, etc., acquired by the Port Authority from the Association was acquired by voluntary agreement. Even if the right of the Association to employ licensed pilots which was destroyed by the amending Act can be regarded as a right of property, in the view of the majority of their Lordships the Association's right to employ pilots was not acquired or used by the Port Authority. Its right to employ them was given to it and acquired by it from the Legislature.
>
> It may be that the Association by its enjoyment over a considerable period of time of a monopoly in the provision of pilotage services had acquired a goodwill, the value of which would be reflected on a sale by it of its business and of which it was deprived by the amending Act. But if that were so, it does not follow that the goodwill was acquired.

[54] Even if we consider the judgment of the dissenting judge, Lord Salmon, it would have made no difference to the *Selangor Pilot Association* case if the amending Act were regulatory or prohibitory. The real question for the board was whether the Act, no matter its nature, was a lawful

deprivation of property. In His Lordship's view, the Act itself was to such an extent that it amounted to an unlawful taking of property. At pp. 140-141, His Lordship said:

> It has been argued on behalf of the appellants that the amending Act was merely regulatory: that it only regulated the provision of the pilotage services in Port Swettenham but did not confiscate the respondents' business which had since 1946 consisted of the provision of these services. Even if the Act could properly be described as merely regulatory - which in my view it cannot/would adopt and rely upon the language of Holmes J in (1922) 260 US at page 417 cited by Viscount Simonds in *Belfast Corporation v. OD Cars Ltd* [1960] AC 490 519 at 519:
>
> The general rule at least is, that, while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking.
>
> The Act of 1972 went so far and must have been recognised by the Legislature as going so far as making it inevitable that the Authority would take the respondents' business immediately the Act came into force. If, contrary to my view, the amending Act can properly be characterised as merely regulatory and it does not go far enough to be recognised as a taking, it is impossible to imagine any regulation that could be so recognised.

[55] The next and last case referred to in the question is the decision of this court in *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan*. The respondent had been barred entry from the State of Sabah. He made an application for judicial review challenging the decision of the Director of Immigration disbarring him from entry. The question before the Federal Court was substantially whether the relevant sections of the Immigration Act 1959/63 allowing the Director to make that decision were constitutional. Learned counsel brought to our attention the following passage from our judgment in that case:

> ... Here, we need to refer briefly to the Privy Council decision in *Selangor Pilot Association*. The Association had been carrying on the business of providing pilotage services within certain areas of the Port of Klang and they had in fact a monopoly of the business. The Port Authorities Act 1963 was amended by the Port Authorities (Amendment) Act 1972 which added two new sections, the effect of which was to prohibit the respondents from carrying on their business, within the pilotage districts.

[56] On the basis of the above paragraph, learned counsel argued that s. 70A of the 1974 Act is prohibitory in nature. The appellant cited this authority on the grounds that it affirmed and followed *Selangor Pilot Association*. The first point to note is that the case concerned the issue of whether the exclusion of the right to be heard as provided in s. 59 of the Immigration Act 1959/63, in particular matters relating to the cancellation and revocation of the respondent's entry permit which effectively deprived the respondent of his right to livelihood was unlawful and unconstitutional in light of the express guarantees enshrined in arts. 5 and 8 of the Federal

Constitution. The question before the Federal Court was therefore irrelevant to the question in the present appeal. There the Federal Court was not all called upon to interpret whether a given provision is either regulatory or prohibitory. The *ratio* of *Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan* has nothing to do with the question posed herein; and in any event, the Federal Court only relied on the *Selangor Pilot Association* case analogously to hold that art. 5 and art. 8 rights of the Federal Constitution could be restricted in accordance with law. We do not think that the case takes the appellant's case very far.

[57] At this point, we would refer to the two cases relied on by the appellant. First, is the case of *Coramas Sdn Bhd v. Rakyat First Merchant Bankers Bhd & Anor* [1994] 2 CLJ 143. The *ratio* of this case has nothing to do with the facts of the present appeal. The question for the Supreme Court was whether a contract made in contravention of s. 45(1) of the Banking and Financial Institution Act 1989 (BAFIA) is illegal. The section provides that no person shall enter into an agreement or arrangement to acquire or dispose any interest in the shares of a license local institution without first obtaining approval from the Finance Minister. The Federal Court arrived at the general proposition that a contract made against such prohibitory language is illegal unless the section itself saved the validity of the contract through clear language to that effect. It was in effect an expression of the apex court's view as to whether a contract may be expressly or impliedly in contravention of law. This judgment certainly did not purport to set out any determinative rule on how regulatory provisions may be distinguished from prohibitory ones. The case does not assist us at all.

[58] The second case is *M Pentiah v. Muddala Veeramallappa* 1961 AIR (SS) 1107. A certain committee was conferred with powers to deal with market land. The relevant government then underwent a democratisation process and there were some changes by the committee. One thing led to another and the committee proceeded to sell the said lands to third parties. The petitioners sought *quo warranto* effectively to challenge the jurisdiction of the committee to sell those lands. The action before the High Court failed and hence the writ petition to the Supreme Court of India. The Supreme Court agreed with the High Court and dismissed the petition. In determining the question, the court considered whether the committee indeed had the power to effect the sale under the relevant statute. At the hearing before us, learned counsel for the appellant relied on the following words of Subba Rao J to argue that when a statute is worded in a negative form, that the statute becomes prohibitory. What the appellant quoted was what Subba Rao J said at para. 15: "Negative words are clearly prohibitory and ordinarily used as a legislative device to make a statute imperative".

[59] With respect, the appellant cherry-picked the above passage out of context. In this context, the learned judge's opinion expressed in full reads is as follows:

> This section confers on the Committee an express power couched in a negative form. Negative words are clearly prohibitory and are ordinarily used as a legislative device to make a statute imperative. If the section is recast in an affirmative form, it reads to the effect that the Committee shall have power to transfer any immovable property if the conditions laid down under the section are complied with ... If so, the power of the Committee to alienate the property cannot be questioned ...
>
> We have held that Section 77 confers an express power on the Municipal Committee to sell property subject to the conditions mentioned therein. Therefore, the impugned sales are not *ultra vires* the powers of the Committee. In view of the said express power, no prohibition can be implied from the provisions of Section 76.

[60] Two things can be said of the above passage. First is that passage is against the appellant because reading it in full context, the fact that the section was couched in negative terms did not in of itself make it prohibitory. The net result is that the section had to be regulatory. This is because the committee could do what it had done so long as it complied with the conditions. This is the exact same case with s. 70A of the 1974 Act. And secondly, even if we take the above case at its highest, it was not *per se* concerned with the question of what is regulatory and what is not. This case is of no support to the appellant's argument.

[61] We now revert to the issue at hand. It is true that as landowner of the subject lands, the appellant has proprietary rights or entitlement over minerals and rock material found in the said land. As we have pointed out earlier, condition B states that any provision of the National Land Code or any other written law prohibiting mining or the removal of specified materials beyond the boundary of the land shall not affect the appellant's subject lands. To recapitulate, quarry or mining activities would fall within the ambit of the term 'earthworks'.

[62] Does s. 70A prohibit earthworks? We must begin the task of interpretation of the provision by carefully considering the language used. Although the language is clear and unequivocal, in an inquiry such as this, we must examine more than the label itself to determine the intent of the Legislature and the nature of the statute (see *Edinburg Street Tramways v. Torbain* [1877] 3 AC 58 and *Attorney-General for Canada v. Hallet & Carey Ltd* [1952] AC 427). The section expressly provides that no person shall commence or carry out or permit to be commenced or carried out any earthworks without having first submitted to the local authority plans and specifications in respect of the earthworks and obtained the approval of the

local authority thereto. In this regard, from a plain reading of s. 70A, there is no express provision prohibiting earthworks absolutely. The provision generally permits the activities at issue, subject to regulation. There is no doubt that this provision imposes certain restrictions on earthworks.

[63] Under the scheme of the 1974 Act, an important point to note is that as the authority responsible for granting earthworks plan approval, the respondent is responsible for controlling, supervising and regulating the manner in which earthworks are carried out and to ensure that the landowner at all times complies with the procedural conditions imposed. This is an important and crucial point which we must look closely.

[64] The respondent's duties of controlling, regulating and supervising earthworks can be seen from the following provisions. Submission and approval of earthworks plans are mandatory under s. 70A(1) of the 1974 Act as a pre-condition to the commencement of any earthworks. Under the 1974 Act, the respondent is given power to grant earthworks approval. In exercising the discretionary powers, the respondent must exercise it reasonably and in accordance with the terms of the 1974 Act. It bears noting that the respondent may impose such conditions as it deems fit (s. 70A(3)). What is even more important is that the respondent may order the immediate cessation of the whole or any part of the earthworks if the safety of life or property is affected or is likely to be affected by any earthworks (s. 70A(4)). The respondent can therefore invoke this power if the activity is established to be injurious to the land and environment. Notably, the respondent may, from time to time, give such directions as it deems fit in respect of any earthworks, and the same shall be complied with by the person to whom such directions are given, and where such directions are not complied with the local authority may order the cessation of the whole or any part of the earthworks (s. 70A(5)). The respondent may enter upon any land at any hour of the day or night without notice to the owner or occupier thereof for the purpose of executing any work under this section or for carrying out any inspection for the purpose of this section (s. 70A(8)). Another matter that must be noted is that any person who contravenes any provision of this section or fails to comply with any direction or order given under this section or does any act to obstruct in any manner whatsoever the entry or the execution of any work authorised to be effected or executed under this section by or on behalf of the local authority shall upon conviction be guilty of an offence and shall be liable to imprisonment for a term not exceeding five years or to a fine not exceeding fifty thousand ringgit or to both, and in the case of a continuing offence to a fine which may extend to five hundred ringgit for everyday during which the offence is continued (s. 70A(9)).

[65] We note in this regard that during the Parliamentary Debate in relation to the amendment to introduce s. 70A of the 1974, it was emphasised by the Minister that s. 70A would be applicable to the mining industry for the purposes of controlling environmental pollution (see the relevant extracts

from the Parliamentary Reports (Hansard) in Penyata Rasmi Parliament dated 3 May 1974, pp. 1561-1562]. In short, the 1974 Act provides the foundation for the development of an effective, efficient and competitive regulatory environment for the street, drainage and building sector including mining industry.

[66] It is important to note that The Earthworks (Municipal Council Of Province Wellesley) By-Laws 1992 enacted under s. 70A(17) of the Act provides detailed requirements, specifications and procedures in relation to the earthworks approval process. The respondent when considering and approving an earthworks plan is bound and guided by the provisions of the subsidiary legislation. Hence, the respondent's discretion in granting earthwork approval is not absolute or arbitrary but is confined and restricted to considering and ensuring that the plans conform with the prescribed standards to ensure safety in accordance with the guidelines. Such discretionary powers are not left without legal limitations. The respondent must use the powers judiciously and within the limits of the powers prescribed by the law. As held by the Court of Appeal in *Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin* [1997] 2 CLJ 248; [1997] 2 MLJ 17:

> ... a public decision-maker ... upon whom a power or discretion is vested by Parliament is akin to a trustee. He is under obligation to exercise it reasonably and in accordance with the terms of the relevant statute that confers the power or discretion.

[67] It can be seen from the foregoing analysis that if one looks at the matter as a question of principle and policy, for all intents and purposes, s. 70A relates to the regulation and supervision of earthwork activities. The point which has a strong bearing on this issue is that the approval of earthwork plans is required to enable the respondent as the local authority to control, regulate and supervise operations such as supervision of hill slope cutting, supervision of hill gradients; supervision of cleanliness; supervision of public safety; supervision of the water, silt and sediment flow; and supervision of the boundaries and the interests of adjoining landowners. Since earthworks directly threaten physical harm to persons or property, and may undoubtedly touch on numerous aspects of human life and is capable of giving rise to considerable environmental impacts, as the controlling authority, the respondent is empowered to grant or withhold granting earthworks plan approval or imposing certain legal limitations on the land. Unmistakably, the respondent has a public policy interest in controlling the earthworks.

[68] Simply put, s. 70A in our opinion is regulatory and not prohibitory, in that it only regulates the procedure for carrying out earthworks. Section 70A does not prohibit earthworks absolutely. Clearly the total effect of this section is regulating not only the appellant but also others who carry out any earthworks including quarry activities. It imposes the procedure for carrying out earthworks including quarry activities. The requirement for earthworks

approval under s. 70A does not amount to prohibition of quarrying since the purpose of s. 70A is to regulate the way quarrying is to be conducted so as not to endanger or harm the environment, and is essentially for public good. The restriction placed merely ensures that the proprietary rights of the appellant over the subject lands are exercised in a proper and responsible manner.

[69] We therefore agree with the Court of Appeal that s. 70A does not prohibit quarrying activities but merely regulates such activities. Condition B only gives the appellant the right to quarry but it does not mean that the appellant can carry out quarry activities in any manner, as it likes. Condition B does not exempt the appellant as landowner of the subject lands from having to comply with the provisions of s. 70A of the 1974 Act, which regulate and supervise quarry activities.

Conclusion

[70] In consequence and in view of all the above, our answer to the question of law is as follows: s. 70A of the Street, Drainage and Building Act 1974, which *inter alia* provides that no person shall commence or carry out or permit to be commenced or carried out any earthworks without having first submitted to the local authority plans and specifications in respect of the earthworks and obtained the approval of the local authority thereto, is not prohibitory in character, and therefore, does not apply to quarry activities on a land which issue document of title is issued pursuant to the National Land Code (Penang and Malacca Titles) Act 1963 and carries a condition which states that the land in that title shall not be affected by any provision of the National Land Code or any written law prohibiting mining or the removal of specific materials beyond the boundaries of the land.

[71] The result is that this appeal fails and must be dismissed with costs.

[72] This judgment is prepared pursuant to s. 78(1) of the Courts of Judicature Act 1964, as Justice Ramly Hj Ali had since retired.